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# Abstracts of Recent Cases

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ment of governmental immunity. The doctrine of parental immunity, however, continues to be firmly applied by the states. It is not probable that the *Adkins* decision will have any effect on the application of the doctrines of governmental and parental immunity in West Virginia.

*James Truman Cooper*

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## ABSTRACTS

### Conflicts of Law—Collateral Attack of Foreign Divorce Decrees

The petitioner was granted a divorce in the State of Florida in 1945. The award of alimony purported to bind the husband's estate. Under Florida law such an arrangement is not valid without an express agreement of the parties. The husband made no appeal for correction of the decree. After her husband's death in 1958, the petitioner instituted an action in a West Virginia circuit court in order to determine her rights in the estate. The trial court held the divorce decree to be invalid and unenforceable to the extent that it would be binding upon the husband's estate. On appeal the West Virginia Supreme Court upheld the collateral attack. Certiorari was then granted by the United States Supreme Court, and the decision was reversed based upon the reply by the Florida appellate court to certain certified questions. *Aldrich v. Aldrich*, 378 U.S. 540 (1964).

Article IV, section 1, of the federal constitution requires that a judgment of one state be given full faith and credit in every other state. As a consequence it is generally held that a collateral attack may be maintained only for fraud in procurement or lack of jurisdiction. *Gavenda Bros. v. Elkins Limestone Co.*, 145 W. Va. 732, 116 S.E.2d 910 (1960).

The problem in the instant case involves jurisdiction. Prior to the rendering of this decision by the United States Supreme Court, courts were divided over the issue of a defective judgment providing a basis for collateral attack. Some courts advanced the view that erroneous exercise of jurisdiction established a ground for collateral attack. *West End Irrigation Co. v. Garvey*, 117 Colo. 109,

184 P.2d 476 (1947); *Robertson v. Commonwealth*, 181 Va. 520, 25 S.E.2d 352 (1943). Other courts maintained that once a court acquired jurisdiction the parties could not later collaterally attack a defective or imperfect judgment unless it was procured fraudulently. *Boreman v. Borman*, 291 Ill. App. 135, 9 N.E.2d 667 (1937); *Wallace v. Wallace*, 111 Cal. App. 500, 295 Pac. 1061 (1931); 65 W. VA. L. REV. 89 (1962).

The Court in the principal case appears to have settled the controversy. In rendering the opinion, the Court relied upon the response of the Florida court to certified questions concerning applicable Florida law. Finding that a direct attack was impossible in Florida because the time for appeal had elapsed, the Court reaffirmed the decision in *Johnson v. Muelberger*, 340 U.S. 581 (1950). Here, the Court disallowed a collateral attack in an instance where a direct attack could not be maintained in the granting state.

In the instant case the Court completely accepts the reasoning of the dissent of Judge Calhoun of the West Virginia Supreme Court. The opinion declares with finality that once the court granting full faith and credit has established jurisdiction and the absence of fraud, it is precluded from any investigation into the merits of the case.

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### Personal Property—The Application of the Rule in Shelley's Case

By the operation of the Rule in Shelley's Case, *P* claimed absolute ownership in one-third of a residuary estate which contained both real and personal property. The grant in the decedent's will devised to *P* an undivided one-third interest for life with the remainder in fee simple to his heirs. *Held*, affirmed. A grant to *A* for life, remainder to his heirs-at-law becomes a fee simple in *A*. The rule applies whether the property is real, personal or a mixture of the two. *Riegel v. Lyerly*, 143 S.E.2d 65 (N.C. 1965).

The Rule in Shelley's Case arose historically as a method of preventing the frustration of feudal incidents. Because these incidents were related only to land, there is no real reason for extending the rule to personal property. Generally, Shelley's Rule has not been so extended. *Security Trust Co. v. Cooling*, 28 Del. Ch. 303, 42

A.2d 784 (1945); *Jones v. Rees*, 22 Del. 504, 69 Atl. 785 (1908); *Bennett v. Bennett*, 217 Ill. 434, 75 N.E. 339 (1905). However, subject to some limitations, courts have applied the rule by analogy. *Hall v. Gradwohl*, 113 Md. 293, 77 Atl. 480 (1910); *Sands v. Old Colony Trust Co.*, 195 Mass. 575, 81 N.E. 300 (1904).

Decisions making such application have done so as a rule of construction, thus yielding to the intent of the testator. *Hall v. Gradwohl*, *supra*; *Sands v. Old Colony Trust Co.*, *supra*. Contrary opinions have been rendered upon the theory that Shelley's Rule remains a rule of law when extended to personal property and should be strictly applied despite the intention of the testator. *Hughes v. Nicklas*, 70 Md. 484, 171 Atl. 398 (1889).

A further limitation arises with respect to testamentary trust provisions. In cases where a trust was created in settlement of an estate with power in the trustee to sell, to reinvest or to convey the subject matter, the courts have said that the Rule in Shelley's Case would not be applied. *Bross v. Bross*, 123 Fla. 758, 167 So. 669 (1936); *Sands v. Old Colony Trust Co.*, *supra*. In *Bucklin v. Creighton*, 18 R.I. 325, 27 Atl. 221 (1893), the testator deposited money in trust to pay the income to C for life with the remainder to his heirs in fee simple. The court found the rule was inapplicable because it was clearly the intention of the testator that C should have only a life estate.

In *Melhollen's Adm'r v. Rice*, 13 W. Va. 510 (1878), the West Virginia court recognized that Shelley's Rule was applicable to personal property by analogy. However, the rule was not brought into operation in this case because of the factual situation.

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#### Torts—The Effect of Willful and Wanton Conduct on Parental Immunity

P, a minor, was struck and injured by his father who willfully and negligently operated his vehicle while under the influence of alcohol. The trial court granted judgment for the father on the theory that a minor child cannot sue his parents in tort. *Held*, reversed. The parent-child relationship cannot be used to prevent redress for a child who has been the victim of willful and wanton misconduct. To hold otherwise would be against the principles of

public policy upon which the immunity was originally granted. *Teramano v. Teramano*, 1 Ohio App.2d 504, 255 N.E.2d 586 (1965).

The rule that an unemancipated minor child may not maintain an action against a parent for ordinary negligence is a well-established precedent. *Baker v. Baker*, 364 Mo. 453, 263 S.W.2d 29 (1953); *Securo v. Securo*, 110 W. Va. 1, 156 S.E. 750 (1931); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903). Some courts have applied this rule in such absolute terms that children have been denied recovery in instances of extreme physical cruelty and forcible rape. *Cook v. Cook*, 232 Mo. App. 994, 124 S.W.2d 675 (1939); *Roller v. Roller*, 37 Wash. 242, 79 Pac. 788 (1905).

However, such application has subjected the rule to much criticism. *Borst v. Borst*, 41 Wash.2d 642, 251 P.2d 149 (1952). As a consequence the modern trend of litigation has been to modify or qualify the existing principle. Most deviations have been in the areas of intentional torts, master-servant and vocational relationships and indemnity insurance.

Indemnity insurance has presented a challenge to the reasoning upon which the rule was predicated. When a parent is protected by insurance, tort recovery by the child is no longer a threat to domestic tranquillity. On the contrary, both the parent and the child would derive benefit. *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932); 39 W. VA. L. REV. 266 (1932). This view has had limited acceptance, and courts have continued to deny relief on the theory that the fact of carrying insurance should not create a liability that was previously non-existent. *Baker v. Baker*, *supra*; *Norfolk So. Ry. v. Gretakis*, 162 Va. 597, 174 S.E. 841 (1934).

Further limitations have been imposed upon this general rule in instances where the tort was committed by the parent in a master-servant or vocational capacity. The courts, however, are divided on this issue. Recovery was granted in *Worrell v. Worrell*, 174 Va. 21, 4 S.E.2d 343 (1939), and in *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930), but denied in *Belleson v. Skilbeck*, 185 Minn. 537, 242 N.W. 1 (1932). Similar to the rationale in the insurance cases, the courts have reasoned that because the parent is being sued in his vocational capacity, recovery is no threat to domestic ties.

Where the tort is intentional or results from willful and wanton conduct, recent decisions have allowed recovery. *Wright v. Wright*, 85 Ga. App. 721, 70 S.E.2d 152 (1952); *Mahnke v. Moore*, 179 Md. 61, 77 A.2d 923 (1951). In a case factually similar to the instant case, the court held that recovery should be granted in a wrongful death action. The child's death occurred as a result of an automobile accident caused by his father's excessive speed and state of intoxication while driving. *Cowgill v. Boock*, 189 Ore. 282, 218 P.2d 445 (1950). The West Virginia court expressly reserved this question in affirming the general rule. However, the court intimated that evil intention or malevolent motive might give rise to a modification of the rule. *Securo v. Securo*, *supra*.

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### Torts—Liability for Defective Motor Vehicular Brakes

The *P* and his wife were driving in an automobile in a southerly direction. When *P* stopped for a traffic light, a vehicle driven by *D* ran into the rear of *P*'s car inflicting injury to his wife and damaging the automobile. The collision was attributed to the mechanical failure of the vehicle's brakes. The trial court rendered judgment on the verdict in favor of the *D*. *Held*, reversed. An injury caused by the failure of brake equipment is a self-created emergency. More than ordinary care is required in complying with the statutory duty of keeping the brakes in good working order. The *D* is therefore negligent as a matter of law. *Bird v. Hart*, 2 Ohio St.2d 9, 205 N.E.2d 887 (1965).

Although no absolute duty to keep a vehicle in safe condition exists, an owner is bound to use reasonable care to do so. 5 Am. Jur. *Automobiles* § 251 (1936). The obligation has frequently been enlarged and re-enforced by statutory provisions in some states. 60 C.J.S. *Motor Vehicles* § 261 (1949).

The general rule is that when a statutory violation is the proximate cause of an injury, a motorist may not seek relief by invoking the emergency doctrine. *Cline v. Christie*, 117 W. Va. 192, 184 S.E. 854 (1936); *Rohde v. St. Louis Pub. Serv. Co.*, 249 S.W.2d 417 (Mo. 1952). Relief may be granted only to one who has neither caused nor contributed to the emergency. *Rhode v. St. Louis Pub. Serv. Co.*, *supra*.

However, the courts have not been uniform in determining the degree of negligence raised by such infractions. *Tarr v. Keller Lumber and Constr. Co.*, 106 W. Va. 99, 144 S.E. 881 (1928). Some courts simply have ruled that it is negligence to drive on the highway with defective brakes. *Foster v. Farra*, 117 Ore. 286, 243 Pac. 778 (1926); *Gilmore v. Caswell*, 65 Cal. App. 299, 224 Pac. 249 (1924). Other decisions have regarded a statutory violation as negligence per se. *Beck v. Wade*, 100 Ga. App. 79, 110 S.E.2d 43 (1959).

The pertinent statutes in West Virginia require that every vehicle be equipped with brakes adequate to control the movement of the vehicle. W. VA. CODE ch. 17C, art. 15, § 31 (Michie 1961). A further provision requires that all vehicular equipment be kept in good working order. W. VA. CODE ch. 17C, art. 16, § 1 (Michie 1961). The West Virginia court held in *Spurlin v. Nardo*, 145 W. Va. 408, 114 S.E.2d 913 (1960) that an injury caused by defective brakes is prima facie evidence of negligence. Thus, despite the fact that the West Virginia opinions concur with those of the instant case as to the application of the emergency doctrine, it is questionable whether the West Virginia court would direct a verdict for *P* on the ground that the violation was negligence as a matter of law.

*Ellen Fairfax Warder*